No. 85-504

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

LUNDAY-THAGARD COMPANY,
Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
Respondent.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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REPLY OF LUNDAY-THAGARD COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In its Petition, Lunday-Thagard demonstrated that the ruling below was in direct conflict with four recent decisions of this Court, all of which construe the interrelationship of the Tucker Act with other federal statutes. Because the Tucker Act is the broadest waiver of sovereign immunity enacted by Congress, the issues raised by this petition are of far reaching significance.

This case arose out of the Department of the Interior's agreement to comply with the Department of Energy's price control regulations, its breach of that agreement, and its efforts to retain the money it received as a result of that breach. Rather than addressing the arguments raised in the Petition, Interior now seeks, in addition,

to dissuade this Court from reviewing the decision below by mischaracterizing both Petitioner's position and the Economic Stabilization Act, as well as by altering its litigation position to suit its purposes, *i.e.*, by advancing a position in this Court that is at variance with that previously advanced in *United States v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*").[1]

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[1] The government suggests that the Petition "appears to be jurisdictionally out of time." Brief in Opposition (Br. in Opp. at 2, n. 1). This suggestion is without merit. Judgment was entered July 26, 1985, and one week later, on August 2, 1985, Lunday-Thagard applied to the Chief Justice for a thirty-day extension of time in which to file its Petition. That application was granted on August 7, 1985. While § 211(g) of the ESA, 12 U.S.C. § 1904 note (1976), authorizes the filing of a petition for a writ of certiorari within thirty days after entry of judgment, this Court is authorized by 28 U.S.C. § 2101(c) (1982) to extend the time for filing a petition for up to 60 days, and nothing in the ESA or its legislative history repeals that authority. *See* S. Rep. No. 92-507, 92d Cong., 1st Sess. 12 (1971); H.R. Rep. No. 92-714, 92d Cong., 1st Sess. 8 (1971); S. Rep. No. 92-579, 92d Cong., 1st Sess. 20-21 (1971). In these circumstances, we submit that the Chief Justice, acting on behalf of the Court, has not exceeded his authority in granting Lunday-Thagard an extension of time. The government's suggestion that authority to extend the thirty-day ESA deadline would defeat the purpose of that deadline is plainly incorrect. The maximum time for filing a petition (including extensions) has been shortened by 60 days, and this Court, of course, can deny any requests for extension if there is a reason for more expeditious treatment of a case. The government has not even attempted to make a showing here, nor did the government oppose Lunday-Thagard's application. If, however, this Court should find that the Chief Justice lacked the authority to grant an extension of time, we respectfully submit that Lunday-Thagard's Application for Extension of Time, filed on August 2, 1985, be deemed the Petition for Certiorari, and that Lunday-Thagard's Petition, filed September 24, 1985 (60 days after entry of judgment) be deemed a supplement to that Petition.

A. The Tucker Act Waives Sovereign Immunity For Claims Involving Unlawful Exaction, Breach Of Contract, And Violation Of A Federal Statute Or Regulation

Because this Court ruled, in *Mitchell II*, that the Tucker Act provides the necessary waiver of sovereign immunity for a damage action based upon claims within the scope of that statute, Lunday-Thagard's Petition never asserted that the Economic Stabilization Act ("ESA") waived sovereign immunity. Rather, Lunday-Thagard demonstrated that its complaint alleged jurisdiction under, *inter alia*, the Tucker Act for unlawful exaction, breach of contract and violation of federal statutes and regulations. The government never seriously addresses this point. Rather, as its primary argument, the government addresses an argument Lunday-Thagard did *not* make: "Petitioner errs in contending . . . that Section 210 and 211 of the ESA waive the sovereign immunity of the United States from the damages claim asserted in its complaint." (Br. in Opp. at 6-7. *See also id.* at (1) "Question Presented").

1. *Breach of Contract and Unlawful Exaction*

The government has attempted to brush-aside Petitioner's Tucker Act claims for unlawful exaction and breach of contract—claims that are separate and distinct from any claims under the ESA. This is understandable in light of the fact that the Solicitor General has previously acknowledged that claims for unlawful exaction and breach of contract fall within the Tucker Act's waiver of sovereign immunity. *See* Brief of the United States in *Mitchell II* (No. 81-1748 at 8, 19, 24, 30). Because the government cannot seriously dispute that the Tucker Act waives sovereign immunity for unlawful exaction and breach of contract claims, the government attempts to deny their presence in this case by contending that "petitioner's damages claim, however characterized, rests entirely upon its allegation that the DOI violated the DOE's regulations. . . .'

(Br. in Opp. at 8). It is undisputed, however, that Interior *contractually* obligated itself to comply with those regulations. Accordingly, its failure to comply with those regulations is plainly a breach of contract. We submit that regardless of whether Petitioner may recover for Interior's regulatory violations, the Tucker Act has waived sovereign immunity for Petitioner's breach of contract and unlawful exaction claims. The failure of the Court of Appeals to recognize this amounts to a ruling that Petitioner's Tucker Act remedies have been repealed by implication.[2] This constitutes more than sufficient grounds for review and reversal.

2. *Violations of Federal Statutes and Regulations*

Petitioner has also asserted an independent claim, under the Tucker Act, based upon Interior's violations of federal statutes and regulations. Thus, the ESA is relevant to this action not as a waiver of sovereign immunity, but rather as a statute providing the substantive right to recover, under the Tucker Act, for violation of a federal statute. As this Court unequivocally held in *Mitchell II*, it is the Tucker Act that provides the necessary waiver of sovereign immunity for ESA claims, just as it does for contract and unlawful exaction claims. The dispositive nature of the *Mitchell II* holding has been recognized by the district courts that have denied motions to dismiss other actions against Interior for overcharges. One such opinion, which analyzed the issue in depth, stated:

> The threshold question here, then, is not whether the private right of action section in the [ESA] provides an express waiver of sovereign immunity, but whether [plaintiff's] claims fall within the Tucker

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[2] The government's only response to this issue is the circular argument that "[b]ecause the ESA does not provide petitioner with a cause of action against the United States, petitioner has no remedy that can be enforced under the Tucker Act." (Br. in Opp. at 9). This argument is plainly inconsistent with *Mitchell II*.

> Act category. Because [plaintiff] is asking for monetary damages based upon the DOI's violations of regulations promulgated pursuant to the EPAA, there can be no dispute that [plaintiff] has asserted a damage claim against the United States that is founded on an Act of Congress and on executive regulations. [Plaintiff's] claims fall squarely within the Tucker Act category, and the United States has presumptively consented to be sued.

Wesreco v. United States Department of Interior, 618 F. Supp. 562, 569 (D. Utah 1985). In analyzing the ESA solely from the standpoint of whether it waives sovereign immunity, the government has simply failed to acknowledge the *Mitchell II* decision and the change in the law resulting from that decision.

This is dramatically illustrated by the government's contention that "[t]his Court denied a petition for a writ of certiorari in *McCulloch Gas Processing Corp. v. Canadian Hidrogas Resources, Ltd.*, 439 U.S. 831 (1978), that presented the same question, and *nothing has changed* since then *that warrants different treatment of the petition in this case.*" (Br. in Opp. at 6) (emphasis added). There has been a fundamental and profound change since the *McCulloch* decision, however. The *McCulloch* decision relied very heavily upon the very language in *United States v. Testan*, 424 U.S. 392 (1976), that was expressly overruled in *Mitchell II*. As explained in *Wesreco v. United States Department of the Interior*, *supra*, 618 F. Supp. at 571:

> There is no doubt that the *Griffin-McCulloch* line is explicit progeny of *Testan*. And in *Mitchell II*, the Supreme Court expressly stated that any language in *Testan* suggesting that the Tucker Act does not serve as a broad waiver of sovereign immunity "should be disregarded."

Thus, the question of whether the ESA waives sovereign immunity has been rendered totally irrelevant by *Mitchell II*. As a result, the various arguments advanced by the

government regarding *why* the ESA does not waive sovereign immunity are also irrelevant.

In any event, the government's contentions concerning the ESA are simply incorrect. Indeed, in an effort to bolster its ESA argument, the government resorts to a mischaracterization of that statute claiming that "[a]lthough Section 210 provides a cause of action against any 'person' who violates the price controls, the court of appeals correctly held . . . that this term does not include the United States." (Br. in Opp. at 7). This statement simply is not true. Section 210(a), which provides a right of action for damages for violation of the price control regulations, does not use the word "person" in specifying who may be sued.[3]

> (a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitation in section 211), and/or damages.

The government also cites one sentence in the Senate Report of the ESA for the proposition that the government will not be the subject of an action under Section 210. (Br. in Opp. at 7). Because Section 210 is unambiguous, resort to legislative history is inappropriate here.[4] In any event, nothing in this isolated passage of legislative history evidences any intent by Congress to allow the Department of the Interior to evade its *contractual* obligations, to repeal existing Tucker Act rem-

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[3] While Section 210(b) of the Stabilization Act does use the term "person" in the context of a defendant, the reference is to the trial court's discretion to award attorneys' fees, costs and treble damages.

[4] The full quote, moreover, reveals, that, at the very most, this statement in the Senate Report applied only to recovery of treble damages. *See* S. Rep. No. 92-507, 92d Cong., 1st Sess. 1971, U.S. Code Cong. & Admin. News 2283, 2291.

edies and to leave parties who do business with a government agency with no remedy at all for breach of contract. As this Court has stated:

> In such case . . . "[w]hen one admissible construction will preserve a statute from unconstitutionality and another will condemn it, the former is favored even if language, . . . and arguably the legislative history points somewhat more strongly in another way.

Regional Rail Reorganization Act Cases, 419 U.S. 102, 134 (1974).

B. The Outer Continental Shelf Lands Act Provides An Independent Waiver of Sovereign Immunity

Even if a waiver of sovereign immunity, in addition to the Tucker Act, is required, the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.* which was also asserted as a basis for jurisdiction in Lunday-Thagard's complaint, provides such a waiver. That statute requires sales of royalty oil, such as those that were made to Lunday-Thagard, to be made "at the regulated price." 43 U.S.C. § 1353(b)(2). The term "regulated price" is defined in the Act as the highest price at which crude oil may be sold pursuant to DOE regulations. 43 U.S.C. § 1353(e)(1)(A). The Act further authorizes the commencement of a civil action "against any person, including the United States . . . for any alleged violation of any provision of this subchapter. . . ." 43 U.S.C. § 1349(a)(1). For the most part, the government has simply ignored OCSLA. While the government contends that only injunctive relief is available against the United States (Br. in Opp. at 12 n. 10), it cites no authority for this proposition. We are aware of no such authority that conflicts with the plain language of the statute.[5]

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[5] The government mischaracterizes the point made by Amici Howell *et al.* regarding the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1701 *et seq.* The point

C. The Government Has Resorted To Defenses On The Merits, In Tacit Recognition That Sovereign Immunity Does Not Bar Lunday-Thagard's Claim

Knowing that this action is not barred, the government has advanced defenses on the merits as grounds for the denial of certiorari. These defenses are for the trial court to address in the first instance. They are, in any event, without merit.

1. *The "Technical Violation" Defense*

While, the government repeatedly refers to Petitioner's claims as involving "technical defect[s]" (Br. in Opp. at 11), and nonsubstantive "formalistic" violations (Br. in Opp. at 12, n. 10. *See also id.* at 4-5), the government never addresses TECA's finding that while there is no remedy, "Plaintiff presents a claim of injury which on its face appears to call for a remedy." (Pet. App. at 8a).

Indeed, in cases involving the very violations alleged here, TECA has squarely rejected the defense that these violations are "only technical violations." *Johnson Oil v. DOE*, 690 F.2d 191, 201 (TECA 1982). In any event, the amount of any damages resulting from Interior's violations is a question for the trial court. The issue here is whether Petitioner is entitled to have that issue determined by the trial court.

2. *The Exception Relief Defense*

The government contends that the issues raised by Lunday-Thagard will disappear because "the DOE is likely to correct any technical defect in the DOI's certification forms by retroactively granting the DOI an exemption from the applicable requirements. . . ." (Br.

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made by Amici was that Interior had proposed a section to that Act that would have immunized Interior retroactively from its violations of the DOE price regulations. *See* Amici Brief of Howell *et al.* at 7-8, Petition at 17, n. 4. Thus, if Interior was truly immune from liability for price control violations, it would not have been necessary for Interior to have sought such amnesty.

in Opp. at 11). This "exemption" will not "correct" anything, because the grant of an exemption, or exception, pursuant to 10 C.F.R. § 205.50, does not oust a district court from jurisdiction to decide a damage action brought under Section 210 of the ESA. *See Bulzan v. Atlantic Richfield Company*, 620 F.2d 278 (TECA 1980). Moreover, it is far from clear that DOE even has the statutory authority to grant exception relief five years after decontrol. This issue is pending in *Laketon Asphalt Refining, Inc. v. DOE*, Civ. No. EV84-264-C (S.D. Ind.); *Howell Corporation v. DOE*, Civ. No. 85-3112 (D.D.C. Oct. 23, 1985), *app. pending* TECA No. DC-107.[6]

Finally, however, the grant or nongrant of retroactive exception relief does not detract from the "current importance" of this case (Br. in Opp. at 11). The Department of the Interior, which is one of the largest sellers of oil, gas, coal, timber and other such products, has urged dismissal of non-ESA cases on the basis of TECA's decision in the instant case. *See* Petition at 9-10, n.3.

In sum, it is evident that Interior is attempting to utilize the decision below to evade this Court's ruling in *Mitchell II*. This Court must review the decision below because of its inconsistency with *Mitchell II*, *The Regional Rail Reorganization Cases* and the other cases discussed in the Petition.[7]

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[6] It is presumptuous, to say the least, for Interior to predict the outcome of a DOE adjudicatory administrative proceeding concerning Interior's Application for Exception Relief. One of the grounds for Laketon's challenge to the grant of exception relief is bias. As alleged by Laketon, Donald Hodel, formerly Deputy Secretary of the Interior, led the unsuccessful fight for retroactive legislative amnesty. Mr. Hodel thereupon became Energy Secretary and, in the *Laketon* case, granted Interior the very amnesty Congress had refused to grant. Lunday-Thagard has raised these same issues in opposing Interior's request for exception relief in its own case.

[7] The government contends that the district court's ruling on statute of limitations "provides an independent and adequate basis

CONCLUSION

For the reasons set forth above, as well as for the reasons set forth in Lunday-Thagard's Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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for the judgment below." (Br. in Opp. at 6). This contention is demonstrably without merit. The district court dismissed the action as time barred, ruling that the Louisiana one-year prescription barred Lunday-Thagard's action (Pet. App. at 9a-17a). 28 U.S.C. § 2401(a) provides:

> Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

This six year limitation period is "definitive." *Holmberg v. Ambrecht*, 327 U.S. 392, 395 (1946); *Saffron v. Department of the Navy*, 561 F.2d 938, 941, n. 17 (D.C. Cir. 1977). This is true even where a shorter limitation period would apply to identical proceedings involving private parties. *Eastern Freightways, Inc. v. United States*, 257 F.2d 703 (2d Cir. 1958); *Poindexter v. United States*, 647 F.2d 34 (9th Cir. 1981); *Young v. United States*, 184 F.2d 587 (D.C. Cir. 1950). The government's reliance on *Johnson Oil Co. v. DOE*, 690 F.2d 191 (TECA 1982) (Br. in Opp. at 5, n. 4), is misplaced. The *Johnson* case (notwithstanding its caption) was a suit between private parties—not an action against the United States. It is, therefore, beyond dispute that the six year statute of limitations set forth in 28 U.S.C. § 2401(a) governs this action.